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No. 90-1027

In the Supreme Court of the United States

OCTOBER TERM, 1990

HELEN JEAN GUERCIO, PETITIONER

v.

GEORGE BRODY AND JOHN FEIKENS, FORMER JUDGES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT BRODY IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly held that a bankruptcy court judge was entitled to qualified immunity from liability in damages in a *Bivens* action against him arising out of the dismissal of his secretary.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 3a-29a) is reported at 911 F.2d 1179. The decision of the district court with regard to respondent George Brody (App., *infra*, 1a-8a) is unreported. The decision of the district court with regard to respondent John Feikens (Pet. App. 30a-42a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1990 (Pet. App. 2a). A petition for rehearing was denied on September 25, 1990 (Pet. App. 1a). The petition for a writ of certiorari was filed on December 26, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the late 1970s, the U.S. Bankruptcy Court for the Eastern District of Michigan (Bankruptcy Court) comprised four judgeships, three of which were assigned to Detroit.[1] At that time, respondent George Brody was a judge in the Detroit Division of the Bankruptcy Court. Respondent John Feikens was then Chief Judge of the Eastern District of Michigan (District Court). Petitioner was Judge Brody's secretary from January 1979 through October 1981, when Judge Brody dismissed her.

During this period, corruption was uncovered in the Detroit Division of the Bankruptcy Court. Investigations by the Administrative Office of the United States Courts (AO) and by law enforcement officials led to the resignation of one of the Bankruptcy Court judges and to the convictions of court personnel.

On May 6, 1981, the Judicial Council of the Sixth Circuit ordered the Bankruptcy Court placed under the direct supervision of the District Court. The Council's order stated that this action was necessary for "the effective and expeditious administration of the business of the courts within this circuit." Pet. App. 5a (quoting Judicial Council order of May 6, 1981). Under the order, the supervision included "the oversight of the general operation of the Bankruptcy Court Clerk's Office, the appointment of an Acting Clerk of the Bankruptcy Court and the approval of all personnel actions affecting employees of the Bankruptcy Court." *Ibid.* By subsequent order of May 18, 1981, the District Court delegated this supervisory authority—including authority over personnel actions—to Judge Feikens. *Id.* at 6a.

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[1] 28 U.S.C. 152 (1978); 28 U.S.C. 152(a)(1)-(2) and (b)(1) (1984).

2. Petitioner brought a *Bivens* [2] action against respondents in the United States District Court for the Eastern District of Michigan, alleging that, in violation of her rights under the First Amendment, respondents had terminated her for her role in exposing corruption in the Bankruptcy Court. Petitioner sought civil damages and equitable relief, including reinstatement. Pet. App. 69a-78a.

Petitioner alleged that in late 1979 she became aware of improprieties in the Bankruptcy Court concerning the system for assigning cases to judges. Beginning in May 1980, petitioner reported these and other irregularities [3] to the AO, which began an investigation in October 1980. Petitioner also provided information to the FBI, and at some point a criminal investigation began. Pet. App. 71-73a.

Petitioner further alleged that, in June 1981, one of the three Bankruptcy Court judges resigned. Shortly thereafter, a committee of District Court judges nominated George Woods to fill the vacancy. Woods' nomination was then approved by a screening committee of Michigan attorneys. After Woods had been approved by the committee, but before he was appointed, petitioner found some newspaper articles about Woods' unsuccessful bid for a position as a United States Attorney in 1969. Petitioner sent copies of the articles to the nominating committee, the AO, the FBI, and "various newspaper reporters." Pet. App. 73a-74a.

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[2] *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

[3] The other irregularities alleged were that the Clerk of the Court "was abusive toward women, accepted favors from lawyers, was often drunk on the job, and engaged in patronage activities in the Clerk's Office." Pet. App. 71a.

Petitioner alleged that Woods told Judge Brody that, if appointed, Woods would not work with Brody unless Brody fired petitioner. Petitioner also alleged that Judge Brody terminated her employment at Judge Feikens' direction. The termination was allegedly motivated by "her participation in exposing corruption in the Bankruptcy Court and her distribution of the 1969 newspaper articles." Pet. App. 74a.

3. The district court initially dismissed the action on grounds of absolute immunity. Pet. App. 43a-48a. A panel of the Sixth Circuit reversed, *Guercio* v. *Brody*, 814 F.2d 1115 (1987), but that decision was later vacated pending rehearing en banc, 823 F.2d 166 (1987). After this Court issued its decision in *Forrester* v. *White*, 484 U.S. 219 (1988), the Sixth Circuit vacated the order granting rehearing en banc, reinstated its mandate, and remanded the case to the district court for consideration in light of *Forrester*. Pet. App. 63a-64a. On remand, the district court denied motions by each respondent to dismiss on grounds of qualified immunity. See *id.* at 30a-42a (order denying Judge Feikens' motion); App., *infra*, 1a-8a (order denying Judge Brody's motion). Each respondent appealed, and the appeals were consolidated.

4. The court of appeals reversed, relying on *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), to hold that respondents were entitled to qualified immunity. Pet. App. 3a-29a.[4]

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[4] The court of appeals understood petitioner to allege that Judge Brody terminated petitioner "only upon direction from Feikens, and not for independent reasons or on [Brody's] own initiative." Pet. App. 22a n.6. Based on this understanding, the court analyzed the "qualified immunity question * * * from the perspective of Judge Feikens, only." *Ibid.* With respect to Judge Brody, the court held: "Having concluded that

The court observed that petitioner's complaint depicted her as a "disseminator of matters of ostensible public interest," and thus implicated her rights under the First Amendment. Pet. App. 9a. The court accordingly framed the issue as whether, accepting the allegations in the complaint as true, "[petitioner's] rights were so clearly established when she was terminated that Judge Feikens should have understood that his conduct at the time he ordered her discharged violated her first amendment right to free speech." *Ibid.* (citing, inter alia, *Anderson* v. *Creighton*, 483 U.S. 635 (1987)).

The court recognized (Pet. App. 10a) that, at the time of petitioner's discharge, the right of a public employee to speak on matters of public concern had been "clearly established" in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). *Pickering* had enunciated a by-then "familiar rule of balance" that required weighing "a public employee's interest in commenting on matters of public concern" against "the employer's interest in 'promoting the efficiency of the public services it performs through its employees.'" Pet. App. 10a (quoting *Pickering*, 391 U.S. at 568).

The court further recognized that, under *Harlow*, its inquiry could not end at this point. "[T]he *Harlow* test * * * in the first instance require[s] a determination of whether a clearly established right was alleged to have been violated, and, secondly, a determination of whether a reasonable public official should have known that the conduct at issue was undertaken in violation of that right." Pet. App.

Feikens is entitled to immunity, then Brody, too, benefits from that determination." *Ibid.* Petitioner does not challenge that approach here, nor does petitioner dispute the court of appeals' characterization of her allegations in this regard.

11a; see also *id.* at 12a (quoting *Anderson* v. *Creighton* for the proposition that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."). The second determination entailed inquiry whether during the period 1979 through 1981

> judges of reasonable competence in the position of Judge Feikens * * * could have disagreed upon whether [petitioner's] right to exercise her * * * right to free speech without being terminated was * * * outweighed by the public interest in restoring morale, cooperation, dignity, public respect, and confidence to the United States Bankruptcy Court for the Eastern District of Michigan, a court that had been corroded by corruption and favoritism.

Pet. App. 14a.[5]

In considering petitioner's allegations, the court observed that petitioner's reports prompted Judge Feikens to request the AO investigation. Pet. App. 16a. The court noted that the AO investigation and other investigative efforts led the Judicial Council to place the Bankruptcy Court under the direct supervision of the District Court. *Ibid.* By June 1981, a Bankruptcy Court judge resigned, as did other court personnel implicated in the wrongdoing. *Ibid.* Thus, through the early summer of 1981, efforts to rehabilitate the Bankruptcy Court were "progressing expedi-

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[5] The public interest so identified derived from the Judicial Council order and the subsequent order of the District Court; the District Court order, which implemented the Council's order, "was directed primarily at rehabilitating the Court, and expressly conferred upon Judge Feikens * * * responsibility for approving all personnel actions." Pet. App. 16a (internal quotation marks omitted).

tiously and effectively." *Id.* at 17a. During this time, petitioner "was neither admonished for nor discouraged from pursuing her activities." *Id.* at 16a.

The court then considered the petitioner's further efforts to distribute certain 1969 newspaper articles about nominee Woods. The court noted that petitioner circulated the articles after Woods had been nominated and after the procedures required prior to appointment had ended. Pet. App. 19a. The court also observed that "the circulation was not accompanied by any newly discovered disclosures of concealed past or current misdeeds or wrongdoing." *Ibid.* Further, in circulating the 1969 articles, petitioner did not attest to their truthfulness or express any opinion on Woods' nomination. *Ibid.*

The court also assessed how a competent judge in Judge Feikens' position would have viewed petitioner's activities. The court noted that the statutes in effect in 1981 created an "interdependent working relationship * * * between the bankruptcy and district courts and the judges thereof." Pet. App. 14a. This relationship, coupled with the Judicial Council order, posed a "potential for internecine conflict in the court." *Id.* at 15a. As a result, "[c]oncerns for inter-chamber harmony, cooperation, and collegiality between judges and court personnel * * * were in all probability central and indispensable to the efforts of Judge Feikens to implement the Sixth Circuit's mandate." *Ibid.*

Implementing the Sixth Circuit's mandate, the court noted, required "expeditiously appointing a judge to the vacancy created by the resignation." Pet. App. 19a. In carrying out this responsibility, a competent judge—"[m]indful * * * of the incipient confrontation manifested by the bitter resentment Woods displayed when he advised Judge Brody that

he would, if appointed, refuse to work with Brody unless [petitioner's] employment were terminated"—could reasonably conclude that by the summer of 1981 "[petitioner's] expression and activities had become a force counterproductive and disruptive to the ongoing effort to rehabilitate and revitalize the operation of the Detroit Bankruptcy Court." *Id.* at 19a-20a.

In these circumstances, the court held, "[petitioner's] right to protection under the first amendment was not so clearly established at the time that Feikens ordered her termination that any judge of reasonable competence * * * would have clearly understood that he was under an affirmative duty to have refrained from such conduct." Pet. App. 22a. Judges of reasonable competence could reasonably have disagreed on two issues: (1) whether and to what extent petitioner's various activities all involved matters of public concern; and (2) "where the *Pickering* scale, with all of the parties' competing interests in the balance, would ultimately come to rest." *Ibid.* Based on this holding, the court, over Judge Wellford's dissent, reversed and remanded the case with instructions to dismiss petitioner's claims for money damages.[6]

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[6] The court of appeals went on to address petitioner's claims for equitable relief against respondents in their official capacity. Petitioner advises (Pet. 6) that these claims have now been dismissed by stipulation.

ARGUMENT

The facts alleged in this case are exceptional, but the legal issues are not. The court of appeals applied well-settled principles of qualified immunity to dismiss the claim of a public employee alleging infringement of her right to free speech. The court of appeals' decision is correct and in any event presents no issue warranting review by this Court.

1. As the court of appeals recognized, respondents' defense of qualified immunity required the court to apply the standard set forth in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982):

> [G]overnment officials, performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

The specific right allegedly violated here further required the court "to seek 'a balance between the interest of the [petitioner], as a citizen, in commenting upon matters of public concern and the interest of the * * * employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick* v. *Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering*, 391 U.S. at 568). The court of appeals properly undertook this task, in light of petitioner's claim of retaliatory action, within the framework of "objective legal reasonableness" enunciated in *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). The court correctly framed the issue as whether during the relevant time period

> judges of reasonable competence in the position of Judge Feikens * * * could have disagreed

> upon whether [petitioner's] right to exercise her * * * right to free speech without being terminated * * * was outweighed by the public interest in restoring morale, cooperation, dignity, public respect, and confidence to the United States Bankruptcy Court for the Eastern District of Michigan * * *.

Pet. App. 14a.

To resolve that issue on the facts of this case, the court of appeals similarly relied on firmly established doctrine. The court recognized that the issue was to be decided "exclusively upon the allegations incorporated into the complaint, which must, for purposes of considering the motion to dismiss, be accepted as true." Pet. App. 9a (citing, *inter alia*, *Hishon* v. *King & Spaulding*, 467 U.S. 69, 73 (1984), and *Walker Process Equip., Inc.* v. *Food Machinery & Chem. Corp.*, 382 U.S. 172, 174-175 (1965)). Contrary to petitioner's contention (Pet. 8), it is not "unique" for a court to resolve a question of qualified immunity on the basis of pleadings and prior to discovery. Indeed, "a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery" where, as here, the plaintiff's allegations do not demonstrate a violation of clearly established law. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985).

Petitioner also errs in suggesting (Pet. 7) that the distinctive nature of the facts alleged justifies review by this Court. On the contrary, every case that presents a *Pickering*-type claim entails "particularized balancing." *Connick*, 461 U.S. at 150. The invariable "difficult[y]" (*ibid.*) of striking this balance on the facts of each case does not make each such case suitable for review in this Court.

2. Petitioner contends (Pet. 12-16) that in several instances the court of appeals incorrectly characterized the allegations set forth in her complaint. That fact-bound contention is incorrect and in any event does not warrant further review.

Contrary to petitioner's assertions here (Pet. 12-13), the court of appeals correctly observed that petitioner conceded in her complaint that her activities "affected to some degree the operation of the Bankruptcy Court." Pet. App. 19a. The portion of the complaint to which the court was referring alleged:

> 27. The disruption in the Bankruptcy Court workplace, if any, that may have resulted from plaintiff's disclosures * * * was minor, and such disruption, if any, was in fact caused only by those associated with or sympathetic to the persons whose illegal activities plaintiff had participated in exposing.

Id. at 75a. The court of appeals clearly was correct to understand these allegations as acknowledging some workplace disruption traceable to petitioner's activities.[7]

Petitioner is also mistaken in asserting (Pet. 13) that the court below "assume[d] knowledge of Judge Feikens' subjective motivations." Petitioner relies for this assertion on the court's discussion of Judge Feikens' responsibilities under the Judicial Council order of May 6, 1981. Pet. App. 15a. Petitioner's reliance is misplaced. The court properly analyzed Judge Feikens' mandate under the Sixth Circuit's or-

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[7] Elsewhere in the complaint (Pet. App. 75a (Compl. para. 26)), petitioner alleged that her distribution of newspaper articles did not disrupt "her performance of her duties or her ability to work with others." Nothing in the opinion below suggests that the court of appeals doubted this separate allegation.

der to discern the "factual backdrop" (*ibid.*) for the judge's decision to terminate petitioner. That analysis, as the court emphasized, was a necessary part of "an informed assessment * * * focus[ing] on the *objective reasonableness* of an official's act." *Id.* at 21a (emphasis added).[8]

Petitioner's other fact-specific objections to the court of appeals' opinion are likewise without merit.[9]

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[8] It appears that the court of appeals, in its analysis of the qualified immunity issue, assumed the truth of petitioner's allegations as to respondents' motivation. See Pet. App. 15a-21a. Thus, this case does not raise any of the questions currently pending before this Court in *Siegert* v. *Gilley*, No. 90-96 (argued Feb. 19, 1991).

[9] Contrary to petitioner's assertion (Pet. 14), the court of appeals correctly observed (Pet. App. 19a) that petitioner circulated newspaper articles about nominee Woods after Woods had been nominated and had gone through the screening procedure for nominees. The court also recognized that the circulation allegedly occurred "prior to [Woods'] confirmation" (*id.* at 6a). Petitioner is misguided when she criticizes the court (Pet. 14) for inferring (Pet. App. 17a) that, through the early summer of 1981, efforts to rehabilitate the Bankruptcy Court were paying off. That inference was justified by petitioner's own allegations of her significant role in these efforts and their success. *Id.* at 71a-73a. Finally, petitioner is wrong to take issue with the court's observation (*id.* at 16a) that the "[AO] initially withheld formal action on [petitioner's] original submissions." That is what petitioner's complaint says. *Id.* at 71a-72a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1991

APPENDIX

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action # 84 CV 4736 DT

HELEN GUERCIO, PLAINTIFF

-vs-

GEORGE BRODY and JOHN FEIKENS, DEFENDANTS

JUDGE'S RULING ON MOTION TO DISMISS

Proceedings held in the above-entitled matter, before the HONORABLE JULIAN ABELE COOK, JR., U.S. District Judge, at 237 U.S. Courthouse and Federal Building, Detroit, Michigan, on Tuesday, September 6, 1988.

APPEARANCES:

THOMAS J. MACK, ESQ.
Appearing on behalf of Plaintiff.

R. JOSEPH SHER, ESQ.
Appearing on behalf of Defendant, George Brody.

JAMES K. ROBINSON, ESQ.
Appearing on behalf of Defendant, John Feikens.

[2]

Detroit, Michigan
Tuesday, September 6, 1988
Morning Session

THE COURT: All right. Thank you.

Defendant George Brody has filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12 (b), in which he argued that the complaint which was filed by the Plaintiff Helen Guercio should be dismissed because of the often cited *Bivens* versus *Six Unknown Agents* or governmental immunity. The Plaintiff has filed pleadings in opposition to the instant motion.

For reasons which will be noted later, the Court will deny the Defendant's motion as it relates to *Bivens* and governmental immunity. The Defendant's motion to dismiss with regard to Judge Brody's involvement as an officer of the court will be taken under advisement as a result of the brief colloquy between the Court and counsel.

On October 15, 1984, the Plaintiff filed a complaint in this court for, quote, declaratory injunctive and monetary relief. She bases her claims on the First, Fourth and Fifth Amendments to the United States Constitution. The complaint which has been brought resurrects a sad chapter in the Bankruptcy Court [3] of the United States. Following a series of media accounts with regard to the then alleged improper activities, followed by the resignation of a Bankruptcy Court Judge and the criminal prosecution of at least two persons who were involved in the wrongdoings, George Woods, who was subsequently appointed to serve as a Bankruptcy Judge and later elevated to the District Court, had had his name

placed in nomination for appointment. The Plaintiff allegedly forwarded newspaper clippings about nominee Woods to the Congressional Committee, who had the responsibility of investigating and making a recommendation with regard to the acceptability of the nominee.

According to the complaint, the Plaintiff had served as the legal secretary for Judge Brody for approximately three years between 1979 and October, 1981 when she was discharged. It follows as a result of the discharge that the Plaintiff has instituted this suit, claiming, in essence, that Judge Brody and his Co-Defendant Judge John Feikens, who then served as the Chief Judge of this court and now serves as a Senior Judge of this court, had violated her constitutional rights and had caused her injury in that her reputation, as well as her ability to obtain future employment had been severely impaired.

[4] This matter has been presented to the 6th Circuit Court of Appeals on another matter. The case has now been returned to this Court. Hence, the Court now has jurisdiction to resolve or attempt to resolve those issues which are presently in controversy.

The Defendant, in challenging the Plaintiff's *Bivens* claims, makes two arguments as to why he believes that the *Bivens* claim should be dismissed. His first and primary argument is that there has been no constitutional violation shown. In support thereof, he relied upon a series of cases which originated in the Supreme Court which, in essence, hold that although the Constitution places some limitations on the discharge of public employees, it never extended to those officials such as Judge Brody when and if they dismiss a staff person, who enjoys a con-

fidential relationship, because that staff person may have or have had differing viewpoints. The Defendant Judge Brody relies upon the *Elrod* and *Branti* cases to which reference has been made today.

The Plaintiff, in her opposition to this argument, contends that the *Elrod* and *Branti* cases are inapplicable in that they do not allege that her dismissal was motivated by political animosity or patronage. Thus, it is the Plaintiff's view that both *Elrod* and *Branti* are distinguishable.

[5] Both parties have cited the *Pickering* case, which was decided by the Supreme Court in 1968, in which the Supreme Court held impermissible under the First Amendment the dismissal of a high school-teacher who had openly criticized the Board of Education on its allocation of school funds. As both counsel have acknowledged expressly or implicitly, that none of the cases which they have cited fit squarely on the facts of this case. However, it appears that the case which comes closest to providing this Court with some form of instruction or guidance is the *Pickering* versus *Board of Education* case, which was decided by the Supreme Court in 1968.

At page 568 of that opinion, the Court stated in part as follows:

> "The problem in any case is to arrive at a balance between the interest of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees."

Thus, it would appear that the *Pickering* Court emphasized that an employee should not be sanctioned, because she did not work for the person or the people [6] whom she criticized. And, thus, ac-

cording to the *Pickering* rationale, there was little chance of disruption or disharmony in the work force.

The counsel for the Plaintiff has made reference to the *Columbus Education Association* case, which was decided by the 6th Circuit in 1980. The Court in *Columbus* stated at page 1160 that the relevant factors which would justify any regulation of an employee's speech include:

> ". . . the content of the speech, co-worker harmony, maintaining discipline by immediate supervisors, need for personal loyalty and confidence between workers and supervisors."

In the judgment of this Court, there appear to be several problems with the arguments which have been presented on behalf of Judge Brody. First, the mere fact that a balancing test which utilizes several factors involved makes this case extremely inappropriate for dismissal, especially in view of the many fact issues which are involved. Counsel for the Plaintiff has correctly noted, as has the counsel for the Defendant Brody, that this Court is obliged to deny any motion unless it can be established that the Plaintiff can prove no set of facts which would support her claim that would [7] otherwise entitle her to relief. Under that imbalanced standard, this Court must accept all of the Plaintiff's allegations which have been set forth in the complaint as being true. It should be noted, parenthetically, that this Court believed that the *Elrod* and *Branti* cases to which references have been made are distinguishable from the instant case and, thus, the Court does not believe that they give any meaningful guidance to the Court for a resolution of the instant motion.

A second reason why, in the judgment of this Court, the Defendant's motion should be denied is that this

case appears to be quite different in that apparently none of the criticisms which were voiced by the Plaintiff were directed at Judge Brody. It has been asserted by the Plaintiff that Ms. Guercio only transmitted newspaper articles, which were presumptively critical of Judge Woods, to the committee who was investigating his then pending application. It has been asserted by the Defendant Brody that the Plaintiff had—strike that.

It has been asserted by the Defendant Brody that the then nominee Woods had expressed a view that he could not work with Judge Brody's office. It is unclear whether the comments were directed to Judge Brody, to his office staff, to Judge Brody and his office staff or [8] whomever.

It does appear facially that the Plaintiff's comments were directed to the entire Bankruptcy Court, as well as to the incoming nominee, George Woods. Thus, looking at the evidence in a light that is most favorable to the Plaintiff, it does not appear that her loyalty to Judge Brody had been impaired by the expression of her beliefs.

Moreover, the facts in this case bear a similarity, once again, to *Pickering*. The Court noted at page 570 that:

> "The statements are in no way directed toward any person with whom appellant would normally be in contact in the course of his daily work as a teacher . . . Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships which can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning."

Clearly, the Plaintiff worked for Judge Brody on a daily basis and enjoyed the relationship that exists between a Judge and his secretary. But it does also [9] appear that the Plaintiff did not work for the Bankruptcy Court or for the then nominee, and later to become Bankruptcy Judge, George Woods, about whom she was quite critical.

And, finally, there is a question in the mind of this Court as to whether the fact that a potential judge is offended, with or without justification, is a sufficient basis for another judge to fire that staff member unless the potential judge or nominee would have to work very closely with that staff member. It does not appear that this is the case; and, thus, it would suggest to the Court that on the basis of the imbalanced standard, that the allegedly offensive actions which were taken by the Plaintiff are sufficient reason for another judge to terminate the services of the staff member. And as a postscript, this Court believes that, from the imbalanced standard, that there is a public interest in the alleged actions of the Plaintiff.

As noted earlier, that this court had suffered under a long and seemingly tortuous experience of the Bankruptcy Court, and, ostensibly, it was the effort of the Plaintiff to bring about an efficient, productive and scandal free court. Thus, the Court believes that —strike that. One other point should be mentioned.

For an action to be found to have violated [10] clearly established law, there is no requirement that actual cases involving exact actions in question be on the books. This Court has the responsibility to determine whether the allegations in the Plaintiff's complaint clearly violated established law at the time that the incidence [*sic*] took place.

It is the judgment of this Court that, when based upon an examination of the Plaintiff's complaint, and assuming those facts to be without contest, that her allegations are clearly sufficient. The Court noted in the *Connick* case, which was decided by the Supreme Court in 1983 that:

> "For at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression."

And, thus, the Court does conclude, as it stated at the outset of this opinion, that the Defendant Brody's motion to dismiss the *Bivens* and governmental immunity claims must be denied at this juncture. This Court, thus, denies them without prejudice at this time.

Are there any questions from either counsel with regard to the opinion of the Court? Mr. Mack and Mr. Sher?

[11] MR. SHER: I think your opinion is clear, Your Honor.

May we have 60 days' stay of discovery to consider appeal at this point?

THE COURT: I want to talk with you, since you are physically here, for a moment in chambers with you for a few minutes, and we can discuss that matter.

MR. SHER: Sure.

THE COURT: All right. We will stand in recess.

(Proceedings adjourned at 12:37 p.m.)

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